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Supreme Court of the United States

OCTOBER TERM 1978

No. 77-841

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

vs.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATE PETITIONER

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North LaSalle Street, Suite 900,
Chicago, Illinois 60601 (312) 793-3500,
Attorney for Petitioner.

WILLIAM A. WENZEL,
Special Assistant Attorney General,
130 North Franklin Street, Suite 300,
Chicago, Illinois 60606 (312) 793-2380,
Of Counsel.

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BRIEF FOR THE STATE PETITIONER

OPINIONS BELOW

This case was previously before the United States Supreme Court on a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit as *Edelman* v. *Jordan*, 415 U.S. 651 (1974), reversing and remanding *Jordan* v. *Weaver*, 472 F. 2d 985 (7th Cir. 1973). On remand from this Court there have been three opinions below. The opinion of the United States District Court, Northern District of Illinois, Eastern Division, is reported as *Jordan* v. *Trainor*, 405 F. Supp. 802 (N.D. Ill. 1975). The opinion of a three-judge panel of the United States Court of Appeals for the Seventh Circuit is reported as *Jordan* v *Trainor*, 551 F. 2d 152 (7th Cir. 1977). On review before this Court is the *en banc* opinion of the United States Court of Appeals for the Seventh Circuit in *Jordan* v. *Trainor*, 563 F. 2d 873 (7th Cir. 1977).

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its *en banc* opinion and judgment in this case on October 19, 1977. On December 12, 1977, state petitioner Arthur F. Quern, Director of the Illinois Department of Public Aid, filed a Petition for Writ of Certiorari which was granted by this Court on February 27, 1978. The jurisdiction of the Supreme Court of the United States to review this cause is conferred by 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

(See Supplement)

U.S. Const., Amend. XI;
45 C.F.R. § 206.10(a)(3).

QUESTIONS PRESENTED

1. Is the Eleventh Amendment to the United States Constitution a jurisdictional bar to the exercise of a federal court's equitable powers to award retrospective relief against a non-consenting sovereign state in the form of a class notice regarding entitlement to retroactive benefits?

2. Has the law of this case as established by the Supreme Court in *Edelman* been circumvented and eviscerated by the *en banc* order and judgment of the Court of Appeals?

STATEMENT OF THE CASE

On January 28, 1971 Respondent John Jordan filed an amended two count, class action Complaint in the United States District Court for the Northern District of Illinois against Harold O. Swank, Director of the Illinois Department of Public Aid, and Edward Barrett, Comptroller of Cook County, individually and in their official capacities. (A. 6) Alleging a cause of action under 42 U.S.C. § 1983, Plaintiff charged the defendant Illinois officials responsible for administering the State's Aid to the Aged, Blind and Disabled Program (hereinafter AABD), 42 U.S.C. §§ 1381 et seq.,[1] with violating the AABD statute and implementing regulations,[2] denying equal protection of the laws, and contravening the Illinois Public Aid Code, *Ill. Rev. Stat.*, Ch. 23, § 3-1.

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1. Congress repealed the AABD program by Pub. L. 92-603, October 30, 1972, and simultaneously added a new Title XVI to the Social Security Act, 42 U.S.C. §§ 1381 *et seq.*, entitled Supplemental Security Income for the Aged, Blind and Disabled (SSI). Both the repealer and the new title took effect on January 1, 1974. For a discussion of the relevancy of these changes in the law to this case, see *infra*, Part II A.

2. The federal law at issue was 42 U.S.C. § 1382(a)(8) which mandated that AABD assistance be furnished "with reasonable promptness to all eligible individuals." The Department of Health, Education and Welfare promulgated regulations, effective July 1, 1968, which specified that action on applications for the aged and blind under AABD be taken within thirty days, and action on applications for the disabled under AABD be taken within 45 days (later amended to 60 days). HEW Handbook of Public Assistance Administration, Part IV, Section 2200(b)(3), (4); Section 2300(b)(3), (5). These regulations were formally codified on February 27, 1971 and appeared as 45 C.F.R. § 206.10 (a)(3). (See Supplement hereto)

Count I of the amended Complaint was brought on behalf of a class of "all persons in Illinois eligible for [AABD] who are required by defendants to wait longer than [applicable federal time limits] for a determination of eligibility and receipt of their first assistance check." Count I was based solely on a Supremacy clause claim that the defendants were enforcing state regulations inconsistent with federal statutory and regulatory law.

Count II of the amended Complaint alleged violations of the Equal Protection Clause of the Fourteenth Amendment and the Illinois Public Aid Code, *Ill. Rev. Stat.*, Ch. 23, § 3-1 (1971). This Count was brought on behalf of a class defined as "all applicants for AABD in Illinois who meet the eligibility requirements when they apply but are denied benefits for the intervening period from the date of application to the month in which their grant is authorized." (A. 12-13)

In a single prayer for relief for both Counts of the Complaint, Respondent sought, *inter alia*, a declaration of inconsistency between the state law and the federal statute and regulations, a permanent injunction to compel defendants to comply with the federal time standards in the future, and a permanent injunction "enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld." (A. 15)

On April 16, 1971 the late District Court Judge, Alexander J. Napoli, entered a preliminary injunction against the defendants which for the first time imposed a court

ordered obligation upon the State to process AABD applications in conformity with federal law and regulations. (A. 17) The preliminary injunctive relief secured by Respondent was based solely on Count I of the Complaint (A. 20)

Similarly class certification in the order of April 16th under Federal Rules of Civil Procedure, 23(a) and (b) was limited to the class defined in Count I. (A. 20)

On March 15, 1972, the District Court entered a permanent injunction and Final judgment against the state officials[3] in their official capacities. (A. 23) No relief was entered against any of the state officials in their individual capacities, the Court expressly denying an award of punitive damages against defendant Swank. Paragraphs 1-4 of the Judgment Order (A. 24-25) constituted declaratory and prospective injunctive relief on behalf of the previously certified Count I Class of AABD applicants based upon a Supremacy Clause violation. Paragraphs 5 and 6 of the judgment ordered defendant Weaver "to release and remit AABD benefits wrongfully withheld to all applicants for AABD in the State of Illinois who applied between July 1, 1968 [the date of the federal regulations] and April 16, 197[1] [the date of the preliminary injunction] and were determined eligible . . ." (A. 25-26)[4]

On the State's Appeal, the Court of Appeals for the Seventh Circuit affirmed, holding that the Eleventh Amendment did not bar the exercise of the Court's equitable

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3. Prior to March 15, 1972, Edward T. Weaver had succeeded Harold O. Swank as Director of the Illinois Department of Public Aid and therefore the Judgment Order operated against defendant Weaver. (A. 23)

4. The relief in paragraphs 5 and 6 of the Judgment was entered on behalf of a non-certified Count II class on the basis of a Count I violation.

powers to award retroactive benefits against the State, and in the alternative, that Illinois had constructively consented to suit by participating in the federal AABD plan. *Jordan* v. *Weaver,* 472 F. 2d 985 (7th Cir. 1973). The United States Supreme Court granted certiorari on the issue of whether the Eleventh Amendment barred retroactive benefits.

In reversing the ruling of the Seventh Circuit, *Edelman* v. *Jordan,* 415 U.S. 651 (1974)[5], the United States Supreme Court in a landmark decision unambiguously held that the Eleventh Amendment constitutes a jurisdictional bar to the exercise of federal judicial power and that:

> ". . . a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, Ex Parte Young, *supra,* and may not include a retroactive award which requires payment of funds from the state treasury, *Ford Motor Co.* v. *Department of Treasury, supra.*" 415 U.S. at 677.

Despite this ruling by the nation's highest court, Respondent, on remand before the Seventh Circuit, sought to evade the bar of the Eleventh Amendment by seeking, *inter alia,* an identical order of equitable restitution based on the Fourteenth Amendment, and an order directing the District Court to enter a declaratory judgment that members of the Count II class were illegally deprived of AABD assistance and are entitled to restitution. This subterfuge was unavailing and the Court of Appeals reversed the award of retroactive benefits and remanded

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5. Joel Edelman succeeded Edward T. Weaver as Director of the Illinois Department of Public Aid effective February 13, 1973.

the cause to the District Court with instructions to modify its judgment in accordance with the decision in *Edelman.* (A. 29)

Respondent, in yet another maneuver to undo the ruling of this Court, successfully petitioned the District Court (A. 31) to require the Defendant, James L. Trainor[6] to send a written notice entitled "Notice of Right to Appeal Denial of Benefits" (A. 54) to each AABD applicant whose application was delayed in processing during the period between July 1, 1968 and April 16, 1971, the date of the preliminary injunction. The notice set forth the amount of public assistance "to which you were entitled" for the particular person to whom the notice was ordered sent. The Court further required the state officials to enclose, to each person being notified, a notice of appeal "challenging the denial of benefits." By its terms the notice of appeal set forth the following language as grounds for appeal: "The Department illegally delayed in the processing of my A.B.B.D. application and as a consequence denied me benefits to which I am entitled." (A. 55) The District Court's decision is reported as *Jordan* v. *Trainor,* 405 F. Supp. 802 (N.D. Ill. 1975), (A. 40).

Petitioner appealed this decision to the United States Court of Appeals for the Seventh Circuit, and a three-judge panel of that Court unanimously reversed the order of the District Court and held that the Eleventh Amend-

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6. James L. Trainor succeeded Joel Edelman as Director of the Illinois Department of Public Aid on August 14, 1974. Due to a change in Illinois law which merged the Cook County Department of Public Aid into the Illinois Department of Public Aid effective January 1, 1974, the only official defendant left in the case as of that date, was the state defendant. See *Ill. Rev. Stat.,* Ch. 23, § 12-18.1

ment constituted a bar to the trial court's order requiring such notice. The panel further found that the order attempted to accomplish by indirection an end prohibited by this Court in *Edelman. Jordan* v. *Trainor,* 551 F. 2d 152 (7th Cir. 1977), (A. 57).

The Court of Appeals granted Respondent's petition for a rehearing *en banc* and in a majority decision, three judges dissenting, held that a retrospective order requiring a non-consenting state to send a notice regarding retroactive benefits to members of the Count II class is constitutionaly permissible under the Eleventh Amendment and does not circumvent the law of the case as established by this Court in *Edelman. Jordan* v. *Trainor,* 563 F. 2d 873 (7th Cir. 1977) (*En Banc*) (A. 64).

SUMMARY OF ARGUMENT

I.

The *en banc* decision of the Court of Appeals violates the law of the case as established by this Court in *Edelman* v. *Jordan,* 415 U.S. 651 (1974).

The rule of the law of the case requires a lower federal court to obey the decisions of a superior court, and to refuse to permit relitigation of matters or issues previously decided.

The law of this case is the substantive ruling of this Court in *Edelman,* that the federal courts under the Eleventh Amendment lack jurisdictional power to order payment of retroactive welfare benefits which are payable out of a state's treasury without the state's consent.

Respondent's only purpose in pursuing the Motion to Require Notice to class members is ultimately to collect retroactive money benefits from the state treasury for a past breach of a legal duty. This Court has said that the federal courts lack jurisdiction to order such relief against a nonconsenting state. If the lower courts lack jurisdiction to award relief directly, they may not accomplish the same end by indirection.

The *en banc* decision disregards the law of the case, and without any intervening changes in law or fact, permits the Respondent to relitigate the issue of retroactive damages under another name.

The District Court not only disregarded the law of this case as laid down by this Court, but also violated the mandate of this Court as passed down to it by the Court of Appeals.

This Court in *Edelman* reversed the judgment of the Court of Appeals, which had upheld the order of the District Court for payment of retroactive benefits, and remanded the cause for further proceeding consistent with this Court's opinion. Some seven months later the Court of Appeals remanded the case to the District Court, saying that pursuant to the mandate of the Supreme Court, the District Court's award of retroactive benefits to plaintiffs was reversed.

It has long and consistently been held by this Court that an inferior court may not deviate from an appellate court mandate. It can not give any other or further relief than provided in the mandate.

The Court of Appeals *en banc* participated in and condoned the evasion of the mandate of this Court by approving other and further retroactive relief. In holding that some form of notice was permissible, although not the exact form ordered by the District Court, the Court of Appeals trangressed the limits to federal judicial power under the Eleventh Amendment as construed by this Court.

II.

The Eleventh Amendment is a jurisdictional bar to the exercise of a federal court's equitable power to order retrospective notice relief against a nonconsenting state.

Edelman reaffirmed the principle that the Eleventh Amendment is a jurisdictional limitation upon federal judicial power. The jurisdictional limitation is applicable regardless of the nature of the relief sought. It may not be avoided by characterizing the relief as a "mere explanatory notice", when the end result will be the same: payment of money out of the treasury of a nonconsenting state for a past breach of a duty. The lower courts have exceeded their jurisdiction in granting any type of relief pertaining to retroactive benefits.

The remedial power of the federal courts consistent with the Eleventh Amendment is necessarily limited to prospective injunctive relief. The Court of Appeals evades the ruling of this Court by creating a form of notice intended to be Eleventh Amendment proof, by calling it an adjunct to the purely prospective relief granted in 1972, and by purporting not to create a liability against the State.

The relief Respondent seeks, no matter how provided for, or whatever it is called, is to collect money, admittedly to be paid by the State of Illinois, for breach of a duty from 1968 to 1971. It can by no stretch of the imagination be called prospective injunctive relief or any adjunct to it. It is aimed solely at collecting retroactive benefits from the State barred by *Edelman*.

The event dividing past from prospective for purposes of the Eleventh Amendment is the entry of a court order or judgment requiring a party to conform his conduct to a different standard. The relief sought by Respondent concerning conduct prior to the date of the preliminary injunction is clearly not prospective and is therefore barred by the Eleventh Amendment.

The *Edelman* Court expressly disapproved of compensatory relief. Notice relief in any form under the circumstances of this case is essentially compensatory because past state denial of AABD assistance is wholly unconnected to present Illinois compliance with federal time standards for application processing. There is no link between notice relief in 1978 and an individual's 1968 need for financial assistance. Indeed, notice relief may very well compensate by retroactive payments persons no longer on the welfare rolls. Moreover, even if a person to whom notice were directed is presently on welfare, it is implausible that the withholding of assistance in 1968 coincides with a present need for assistance.

There is no post-*Edelman* authority which supports the notice relief envisioned by the *en banc* order. The Third Circuit Court of Appeals in a welfare case nearly on all fours with this case has ruled that notice relief regarding past wrongdoing is precluded by this Court's decision in *Edelman* and by the Eleventh Amendment.

ARGUMENT

I.

THE *EN BANC* DECISION VIOLATES THE LAW OF THIS CASE AS ESTABLISHED BY THE UNITED STATES SUPREME COURT IN *EDELMAN* v. *JORDAN*.

A.

The Law Of This Case Is That The Eleventh Amendment Bars The Federal Courts From Giving Respondent Any Form Of Relief Against The State Regarding Or Affecting Retroactive Welfare Benefits.

In its *en banc* order and opinion of October 19, 1977, the Court of Appeals ignored the rule of the law of the case. This rule, based upon sound policy, requires an inferior court to obey the decisions of an appellate court and to refuse to permit the relitigation of matters previously decided.

This Court in *Insurance Group Committee* v. *Denver & R.G.W.R. Co.*, 329 U.S. 607, 612 (1947) formulated the rule in the following manner:

> When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court. Thus a cause proceeds to final determination. While power rests in a federal court that passes an order or decision to change its position on a subsequent review in the same cause, orderly judicial action, except in unusual circumstances, requires it to refuse to permit the relitigation of matters or issues previously determined on a former review.

Such a doctrine is necessary for "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members." *Roberts* v. *Cooper*, 20 How. [61 U.S.] 467, 481 (1857).

The law of this case is the substantive ruling by the United States Supreme Court in *Edelman* v. *Jordan*, 415 U.S. 651 (1974) which is controlling on any and all subsequest stages of the case unless vacated or reversed by this Court. The Supreme Court ruled, and the law of the case is, that a federal court lacks jurisdictional power to hear, and Respondent may not litigate consistent with the Eleventh Amendment, issues arising out of the past conduct of a state and secure a mandatory order regarding or affecting retroactive welfare benefits without the state's consent.

Respondent's motion in the District Court on remand represents a scandalous and brazen effort to subvert the decision of the United States Supreme Court and to secure by indirection that which is forbidden directly. The *en banc* ruling of the United States Court of Appeals, in disregard of the law of the case and without any intervening changes in fact or law to justify its conclusion, permits Respondent to relitigate the issue of retroactive damages under the Eleventh Amendment and to secure, by indirection, payment of those same benefits from the state treasury.

If a suit by Respondent seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment under this Court's ruling in *Edelman*, then a lower court is precluded, absent "unusual circumstances", from ordering any relief in the same case which is intended for the same purposes. Respondent's obvious purpose in filing his Motion to Require Notice is to utimately collect retroactive benefit payments

from the state treasury. If the District Court lacks jurisdiction to order relief against a nonconsenting state "measured in terms of a monetary loss resulting from a past breach of a legal duty", *Edelman,* 415 U.S. at 668, then any relief, including notice relief, measured in the same terms and designed to secure retroactive payments is likewise barred.

Judge Pell, in his dissenting opinion in *Jordan* v. *Trainor,* 563 F. 2d 873, 878 (7th Cir. 1977) deplored the artful evasion of the law of the case which the Respondent has perpetrated and in which the Court of Appeals acquiesced. By Judge Pell's analysis there can be no constitutionally inoffensive form of notice regarding retroactive welfare benefits consistent with this Court's decision:

> Notwithstanding laundering efforts in this court, the refined order outlined in the *en banc* majority opinion will still, upon any realistic analysis, result in a situation which 'is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials'.

Since the result, in any practical sense, is indistinguishable from an imposition of a liability, Judge Pell believed that the rule of the law of the case had been violated:

> [t]he constitutionally designated "inferior courts" who have vested in them the "judicial Power of the United States," should, in the orderly exercise of that vested power, refrain from attempting, no matter how artfully done, to accomplish by indirection that which has been specifically prohibited, particularly in the very litigation in which the prohibition was proclaimed. 563 F. 2d at 878.

Petitioner respectfully submits that this Court should likewise conclude that the *en banc* order of the Court of Appeals constitutes reversible error as a violation of the law of this case as established by the ruling in *Edelman.*

B.

The District Court Violated The Mandate Of This Court As Passed Down By The Court Of Appeals.

The majority opinion of this Court in *Edelman* v. *Jordan, supra,* at p. 678, ended as follows:

> For the foregoing reasons we decide that the Court of Appeals was wrong in holding that the Eleventh Amendment did not constitute a bar to that portion of the District Court decree which ordered retroactive payments of benefits found to have been wrongfully withheld. The judgment of the Court of Appeals is therefore reversed and the cause remanded for further proceedings consistent with this opinion.

On October 29, 1974, the Court of Appeals issued its mandate to the District Court. It read as follows:

> On March 25, 1974, the Supreme Court entered a judgment reversing this Court's judgment in this appeal (see 472 F. 2d 985) and remanding for further proceeding consistent with its opinion. See 415 U.S. 651. Further briefs were filed and considered in this Court after the remand.
>
> Pursuant to the mandate of the Supreme Court, it is ordered that the district court's award of retroactive benefit payments to plaintiffs is reversed and the cause is remanded to the court below with instructions to modify its judgment as necessary in order to insure that entitlement need not attach to applicants in Illinois any earlier than required by the version of 45 C.F.R. § 206.10 in force on the date of application. Thus in accord with a recent amendment to 45 C.F.R. § 206.10(a)(3), entitlement shall not be required to attach to applicants for aged and blind benefits who apply after October 15, 1973, until 45 days after the date of application, rather than the 30 days provided for in the court below.

Costs to be borne by the respective parties. (A. 29-30).

The instructions for modification of the judgment pertaining to time requirements in Federal Regulations are not relevant to this present proceeding. They were required because of the changes in 45 C.F.R. § 206.10 after the filing of the case and after the original District Court injunction by Judge Napoli in 1971. See *Edelman* v. *Jordan*, 451 U.S. at 654, n. 3.

The mandate of the Court of Appeals is clear. Omitting the language required by the amendment of the pertinent Federal Regulation, it reads simply:

> Pursuant to the mandate of the Supreme Court, it is ordered that the district court's award of retroactive benefit payments to plaintiffs is reversed and the cause is remanded to the court below . . .

The District Court therefore had no right to consider the question of notice raised by the Respondent for the first time on remand. It is not just a question of whether a particular form of notice may be constitutionally inoffensive as the Seventh Circuit suggests. 563 F 2d at 875. The District Court had no right to consider the question of notice in any form. Consideration of this issue was foreclosed by the law of this case, the mandate of this Court, and the mandate of the Court of Appeals. And if the District Court had no right to open up the question of notice, then it was of course not properly before the Court of Appeals when Petitioner appealed the District Court ruling.

This Court has long and consistently held that an inferior court may not deviate from an appellate court mandate.

In *Briggs* v. *Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948), the Court noted:

> In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. *Himely* v. *Rose*, 5 Cranch 313, 3 L. Ed. 111; *The Santa Maria*, 10 Wheat. 431, 6 L. Ed. 359; *Boyce's Executors* v. *Grundy*, 9 Pet. 275, 9 L. Ed. 127; *Ex parte Sibald* v. *United States*, 12 Pet. 488, 9 L. Ed. 1167. The rule of these cases has been uniformly followed in later days; see, for example, *In re Washington & Georgetown R. Co.*, 140 U.S. 91, 11 S. Ct. 673, 35 L. Ed. 339; *Ex parte Union Steamboat Company*, 178 U.S. 317, 20 S. Ct. 904, 44 L. Ed. 1084; *Kansas City Southern R. Co.* v. *Guardian Trust Co.*, 281 U.S. 1, 50 S. Ct. 194, 74 L. Ed. 659.

It has been stated that the trial court "is without power to do anything which is contrary to *either the letter or spirit* of the mandate construed in the light of the opinion of (the) court deciding the case." *City of Cleveland, Ohio* v. *Federal Power Commission*, 561 F. 2d 344, 346 (D.C. Cir. 1977), citing *Yablonski* v. *United Mine Workers*, 454 F. 2d 1036, 1039 (D.C. Cir. 1971), *cert. denied* 406 U.S. 906, *quoting Thornton* v. *Carter*, 109 F. 2d 316, 320 (8th Cir. 1940). (emphasis supplied)

A similar situation, involving the same District Court Judge who initially approved Respondent's notice relief herein, was recently presented to this Court in *Vendo Co.* v. *Lektro Vend Corp.*, —— U.S. ——, 98 S. Ct. 702 (1978). In *Vendo Co.*, the Honorable Hubert L. Will had issued an injunction against enforcement of a state court judgment based upon a violation of an anticompetition agreement. 403 F. Supp. 527 (N.D. Ill. 1977). The Court of Appeals for the Seventh Circuit affirmed, 545 F. 2d 1050 (1977), and the Supreme Court, on certiorari, reversed, —U.S. —, 97 S. Ct. 2881 (1977). In reversing this Court ordered "that this cause be, and the same is hereby, remanded to the

United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court". See, 98 S. Ct. 703.

On August 19, 1977, the Court of Appeals in turn entered an order remanding the case to the District Court "for further proceedings in conformity with the opinion of the United States Supreme Court rendered on June 29, 1977". See, 98 S. Ct. at 703.

On remand, Judge Will failed to dissolve the injunction as required by the judgment of this Court which led to Petitioner Vendo Co. filing a motion for clarification of the mandate of this Court. Treating Petitioner's motion as a motion for a clarification of judgment, 98 S. Ct. 702, this Court denied it without prejudice to filing a petition for a writ of mandamus in the Supreme Court. Quoting *In re Sanford Fork and Tool Co.*, 160 U. S. 247, 255 (1895) this Court stated:

> "[w]hen a case has been once decided by this Court on appeal, and remanded to the Circuit Court, whatever was before this Court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate."

The passage cited from *In re Sanford Fork and Tool Co.* continues in the original with additional observations appropriate to this case:

> [The Circuit Court on remand] cannot vary [the mandate], or examine it for any other purpose than execution; *or give any other or further relief;* or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded . . ." 160 U. S. at 255 (emphasis added)

The fact that Petitioner in this case proceeded by appeal from the District Court to the Court of Appeals, instead of seeking mandamus, makes no difference in the general principle of law, for the quotation from *In re Sanford Fork and Tool Co.* concludes:

> If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal . . . or by a writ of mandamus to execute the mandate of this court. 160 U. S. at 255.

In the instant case both the District Court and the Court of Appeals (*en banc*) have participated in and condoned Respondent's evasion of the mandate of this court by granting "further relief . . . upon [a] matter decided upon appeal". Such intermeddling with the mandate of this Court in *Edelman* is doubly objectionable. First the effect of the *en banc* ruling is to circumvent and eviscerate the mandate of this Court. Second, and perhaps more important, the Seventh Circuit's order trangresses the limits to federal judicial power set by the Eleventh Amendment thereby undermining the principle of federalism and dual sovereignty inherent in the Constitution. See, Part II, *infra.*

II.

THE ELEVENTH AMENDMENT IS A JURISDICTIONAL BAR TO THE EXERCISE OF A FEDERAL COURT'S EQUITABLE POWER TO ORDER RETROSPECTIVE NOTICE RELIEF AGAINST A NONCONSENTING STATE.

A.

Edelman v. *Jordan* Reaffirmed That The Eleventh Amendment is a Jurisdictional Limitation Upon Federal Judicial Power.

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

In interpreting these forty-three words since the Amendment's ratification in 1798, the Supreme Court has often given heed to the notion expressed by Chief Justice Hughes in *Monaco* v. *Mississippi*, 292 U. S. 313, 322 (1934):

> Manifestly, we cannot rest with a mere literal applicatoin of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of constitutional provisions are postulates which limit and control . . .

The Seventh Circuit Court of Appeals in *Jordan* v. *Weaver*, 472 F. 2d 985 (7th Cir. 1973) ignored Justice Hughes' heeding when it held that the Eleventh Amendment did not bar the exercise of a federal court's equitable power to award retroactive benefits under the label of restitution against the State of Illinois.

In reversing and remanding the ruling of the Seventh Circuit in *Edelman* v. *Jordan, supra,* this Court held:

> [W]e decide that the Court of Appeals was wrong in holding that the Eleventh Amendment did not constitute a bar to that portion of the District Court decree which ordered retroactive payments of benefits found to have been wrongfully withheld. 415 U. S. at 678.

This holding was predicated upon this Court's reaffirmation of the principle that the Eleventh Amendment defense constitutes a *jurisdictional bar* which effectively limits and controls the scope of federal judicial power. The words of the Supreme Court were characteristic, 415 U. S. at 677-678:

> We approve of this resolution, since it has been well-settled since the decision in *Ford Motor Co.* v. *Department of Treasury, supra,* that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court:
>
> "[The Attorney General of Indiana] appeared in the federal District Court and the Circuit Court of Appeals and defended the suit on the merits. The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however. *The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power* of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." 323 U.S. at 466-467. (Emphasis Added).

Edelman teaches that the Eleventh Amendment's jurisdictional character is applicable regardless of the nature of the relief sought. Respondent had argued before this Court in *Edelman* that under the doctrine of *Ex Parte Young,* 209 U. S. 123 (1908) "the Director is stripped in all

respects of his official position when acting in violation of the law, and, accordingly, the federal court may grant whatever equitable relief is appropriate under the circumstances. Moreover, the immunity of a state under the Eleventh Amendment is from a "suit" in federal court and not from certain types of equitable relief." Respondent's Brief, p. 10, in *Edelman*. This Court's holding refuted that contention.

Despite the clear ruling of this Court that the Amendment erects a jurisdictional bar to all forms of relief against a state, Respondent on remand before the Seventh Circuit Court of Appeals, styling himself an "appellant" (as if he were appealing this Court's decision to the Seventh Circuit), filed a 45 page brief in which he reargued the contention that the Fourteenth Amendment worked a repeal of the Eleventh Amendment and requested relief in the form of a Declaratory Judgment that Respondent and the class he represented were illegally denied assistance, and were entitled to restitution.[7]

While the Court of Appeals did not specifically address itself to Respondent's contentions, it nevertheless did not grant declaratory relief with respect to retroactive benefits. (A. 9) An explicit denial of declaratory relief in the face of the Eleventh Amendment would have been the proper course of action for the Court since the Amendment by its terms extends to "any suit in law or equity" leaving no room for the contention that mere declaratory relief escapes the sweep of the constitutional prohibition. Despite

7. The contention that the Fourteenth Amendment worked a repeal of the Eleventh Amendment had been presented in detail to this Court in *Edelman* in the amicus brief of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and in Respondent's Petition for a Rehearing.

silent recognition then of the force of the Eleventh Amendment, some three years later the same Court of Appeals, in the same case and against the vigorous reassertion of the Eleventh Amendment by the state, approved equitable relief in the form of a "mere explanatory notice," 563 F. 2d at 875, to a non-certified, class of recipients of AABD explaining that government inaction seven to ten years ago may now entitle them to monetary payments to meet their past needs[8].

In so ruling the Court of Appeals (*en banc*) disregarded a pertinent observation by the panel decision of the court, *Jordan* v. *Trainor*, 551 F. 2d 152, 153-154 (7th Cir. 1977) (A. 21):

> The Supreme Court in *Edelman* . . . makes it very clear that *the Eleventh Amendment is in substance a juris-*

8. As stated *supra*, p. 4, there no longer exists an AABD program. Pursuant to § 212 of Pub. L. 93-66, as amended by Pub. L. 93-233, § 10, December 31, 1973, 87 Stat. 957; Pub. L. 93-335, § 2(a), July 8, 1974, 88 Stat. 291, Congress required mandatory state supplementation of SSI benefit payments for the benefit of all persons who for the month of December, 1973 were recipients of AABD and whose AABD payment level was greater than the payment level under SSI. In addition the new title XVI of the Act, § 1616, 42 U.S.C. § 1382e allowed for optional state supplementation of SSI benefits to SSI recipients who were not beneficiaries of the aforementioned "grandfather" provision. Both the mandatory and optional state supplementation programs are presently in effect in Illinois, are administered under the Illinois Public Aid Code, Ill. Rev. Stat., Ch. 23, §§ 3-1 et seq., and are wholly state funded. The import of these changes in the law since the filing of this lawsuit in 1971 is that Illinois is uncertain of its right, if any, to seek federal financial participation with respect to any retroactive AABD benefits which may be paid as a result of Respondent's Motion for Notice Relief.

> *dictional bar to the exercise of federal judicial power concerning past action or inaction of a state* with respect to the Aid to the Aged, Blind, or Disabled Program. The granting of any type of relief constituting entitlement to retroactive benefits claimed against the state is therefore precluded in this case. (Emphasis added)

As the State of Illinois has not and does not consent to litigate before a federal tribunal the issue of Respondent's entitlement to some form of relief to remedy past action or inaction of the state under AABD, the District Court and the Court of Appeals (*en banc*) exceeded their jurisdiction in granting any type of relief regarding or affecting retroactive benefits.

B.

A Federal Court's Remedial Power Consistent With The Eleventh Amendment Is Necessarily Limited To Prospective Injunctive Relief.

This suit was originally filed as a claim for violation of Respondent's civil rights under 42 U.S.C. § 1983. The notice which the District Court ordered to be sent, as well as the modified version described by the Court of Appeals (*en banc*), is designed to *remedy* the denial of assistance payments arising out of past conduct of state officials. The Supreme Court in *Edelman* has delimited the scope of a federal court's remedial power under a § 1983 action:

> Though a § 1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is *necessarily limited to prospective injunctive* relief, *Ex Parte Young, supra,* and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co.* v. *Department of Treasury, supra.* 415 U.S., at 677. (Emphasis added)

The order of the District Court, *Jordan* v. *Trainor,* 405 F. Supp. 802 (N.D. Ill. 1975), (A. 12), is labeled an "Injunction" and purports to enjoin James L. Trainor, then Director of the Illinois Department of Public Aid, to notify over 20,000 members of a non-certified class of the denial of assistance benefits and of the right to appeal the denial of benefits, and, to provide the members of the class who appeal an opportunity to secure those benefits from the state treasury.

To achieve its desired end the District Court on remand reasoned that Edelman permits only "prospective" injunctive relief, 405 F. Supp. at 804, (A. 3), and then proceeded to state that "The relief now requested by plaintiffs is neither one for retroactive monetary relief nor an injunction requiring the state to conform its conduct in the future to a set of standards." *Ibid.* Thus seemingly freed from the constraints of *Edelman,* the District Court declared that the Eleventh Amendment "has never been held to prohibit federal courts from fashioning other appropriate relief in suits in law or in equity between citizens of a state and officials of the same state", 405 F. Supp. at 805, (A. 5). This statement is inaccurate and overlooks, with respect to citizens of the same state, the case of *North Carolina* v. *Temple,* 134 U.S. 22 (1890) (bill in equity to require a state auditor to levy and collect certain taxes), and ignores the *Edelman* Court's specific mention of *Hagood* v. *Southern,* 117 U.S. 52 (1886) and *In re Ayers,* 123 U. S. 443 (1887), "both actions against state officers for specific performance of a contract," 415 U. S. at 666. None of these cases was overruled by *Ex Parte Young, supra,* and they "demonstrate that equitable relief may be barred by the Eleventh Amendment." 415 U. S. at 666.

The District Court cited three recent cases which it contended support its conclusion that notice relief concerning

retroactive welfare benefits is not barred by the Eleventh Amendment. *Grubb* v. *Sterrett,* 315 F. Supp. 990 (N.D. Ind. 1970), *sum. affd.,* 400 U.S. 922 (1971); *Doe* v. *Gillman,* 479 F. 2d 646 (8th Cir. 1973), *cert. denied,* 421 U.S. 920 (1975); and *Morris* v. *Houston,* — F. Supp. — (unreported decision, No. 0-25073-C.A., W.D. Mich. October 18, 1974) *reversed* by order of the 6th Cir. as a result of the decision in *Burns* v. *Alcala,* 420 U.S. 575 (1975). Neither *Grubb* nor *Gillman* has any precedential value for the issue here, as both were decided before *Edelman* and neither dealt with the issue of Eleventh Amendment immunity.

Morris v. *Houston, supra,* is clearly distinguishable. *Morris* did not stand for the proposition that a federal court has the power to require a nonconsenting state to send a notice to a non-certified class of plaintiffs regarding benefits withheld *prior* to either the filing of the lawsuit or the granting of preliminary injunctive relief. Two sub-classes of Aid to Families with Dependent Children (AFDC) recipients had been defined and certified in *Morris*: those individuals who applied for AFDC assistance for unborn children between the filing of the Complaint, and the date of the preliminary injunction; and those individuals who applied for assistance after the date of the court's preliminary injunction. Injunctive relief, on behalf of the first subclass, granted prior to the decision in *Edelman*, was dissolved by the court as there was no further need for relief. The court ordered notice sent only to the second sub-class. This aspect of the *Morris* order was clearly an example of permissible prospective injunctive relief or an adjunct thereto. *Morris* was no authority for the retroactive notice relief which the District Court ordered in the instant case or the relief envisaged by the Seventh Circuit.

The panel decision of the Court of Appeals, *Jordan* v. *Trainor,* 551 F. 2d 152 (7th Cir. 1977), (A. 18) did not

accept the District Court's reasoning that the notice relief Respondent requested was consistent with the Eleventh Amendment. Judge Whelan reiterated the ruling of this Court that only prospective injunctive relief is permissible consistent with the Eleventh Amendment, 551 F. 2d at 154, and notes correctly that the constitutional provision limits "federal judicial power concerning past action or inaction of a state," 551 F. 2d at 155. The Court equated the notice to be sent with an admission by the state that it is liable for retroactive benefits and concluded that the notice constitutes forbidden relief which will order, in effect, the payment of state funds by retroactive award for past action or inaction by the state.

The *en banc* decision of the Court of Appeals, while rejecting the District Court's version of a notice, envisions a form of notice which would be Eleventh Amendment "proof": it would be simply an "adjunct to the purely prospective relief" granted in 1972 to the Count I class, 563 F. 2d at 875, and it would not create a liability against the state, *Ibid.* at 876.

There are several things wrong with this analysis. First, prospective injunctive relief, under *Ex Parte Young, supra,* is in the words of this Court, designed to effect "compliance in the future with a substantive federal-question determination." 415 U.S. at 668. Specifically this Court approved as prospective injunctive relief that portion of the original District Court's judgment order which required the state official to conform his AABD application determination process to the confines of the standards imposed by the applicable federal regulations issued by HEW. It is difficult to understand how notice relief regarding state inaction during a period of time from 1968 to April 16, 1971 (the date of the District Court's preliminary injunction) and possible entitlement to back benefits can be fairly char-

acterized as an "adjunct to the purely prospective relief granted." Petitioner submits that, for purposes of the Eleventh Amendment, both the "class" of recipients seeking relief and the relief itself are "retroactive" in that they are defined in terms of a period of time when the Director of the Illinois Department of Public Aid was under no court-imposed obligation to conform his application-processing procedures to a different standard.

If it is to be argued, as the Court of Appeals seemingly does, that notice relief is an adjunct to prospective relief, then what is the standard or law that *Petitioner* is presently violating which requires that his conduct be constained to conform to a different standard?[9]

Second, the relief, as noted in Judge Pell's dissent "is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of defendant state officials" and will assuredly lead to payment of state funds from the state treasury and will not be satisfied from the funds of Petitioner Quern or any of his predecessors.

Finally, the relief concedely runs against the State of Illinois and not Petitioner, 563 F. 2d at 875, and is therefore impermissible under either *Ex Parte Young* or *Edelman* in the face of an assertion of the Eleventh Amendment as a defense.

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9. Respondent argued below that Petitioner is violating his due process obligation to notify respondent and the retroactive class members of the state's past denial of benefits. The Court of Appeals (*en banc*) did not even dignify this contention by taking note of it. This was appropriate as Respondent's Complaint (A. 6) is devoid of any due process claim and the first time this claim surfaced was in Respondent's Brief in the Seventh Circuit in response to the same question posed here.

It is respectfully submitted that no form of notice relief concerning retroactive benefits is permissible under this Court's ruling in *Edelman* or consistent with the bar of the Eleventh Amendment. While the substance of the relief sought is an important factor it is not controlling. What should be considered is whether the relief seeks to effect a retroactive enforcement of a right, nominally against a state official, but in essence against a sovereign state, with respect to a period of time when the state official "was under no court-imposed obligation to conform to a different standard." 415 U.S. 668. The notice envisaged by the Court of Appeals (*en banc*), in Judge Tone's dissenting opinion, is relief "aimed solely at retroactive enforcement" of Respondent's rights against the state, and thus barred by *Edelman*. 563 F. 2d at 878.

C.

The Event Dividing Past From Prospective For Purposes Of The Eleventh Amendment Is The Entry Of A Court Order Or Judgment Requiring A Party To Conform To A Different Standard.

The Supreme Court reversed the order awarding benefits in this case for members of the Count II class, defined as those who were denied assistance between July 1, 1968 and April 16, 1971, because the order was not prospective. It was not prospective because it required the payment of state funds:

> "... not as a necessary consequence of complying with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule *at a time when petitioner was under no court-imposed obligation to conform to a different standard.*" 415 U.S., at 668. (Emphasis Added)

Twice prior to its notice ruling in *Jordan,* the Seventh Circuit was confronted with the question of permissible equitable relief consistent with the Eleventh Amendment subsequent to the *Edelman* decision. *Vargas* v. *Trainor,* 508 F. 2d 485 (7th Cir. 1974), *cert. denied,* 420 U.S. 1008 (1974); *Townsend* v. *Edelman,* 518 F. 2d. 116 (7th Cir. 1975).

In both *Vargas* and *Townsend* the Seventh Circuit rejected attempts by welfare recipients to circumvent the prospectivity limitation of *Edelman* and to secure retroactive benefits. In reaching its conclusion the Court was required to determine where to draw the line between permissible relief and relief precluded by the Constitution.

The Court concluded that the event dividing past from prospective is the "entry of a court order or judgment requiring that payments be made." *Vargas* v. *Trainor, supra* at 485; *Townsend* v. *Edelman, supra* at 120, n. 8. If the Court of Appeals (*en banc*) had applied these prior rulings to the notice issue before it, it could only have concluded that the District Court's entry of preliminary injunctive relief on April 16, 1971, (A. 17), divided the past from the future for Eleventh Amendment purposes.

This Court in *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976) seems to place the line of demarcation at "the entry of [a court's] determination of . . . wrongfulness," 96 S. Ct. at 2669.

In either case the relief sought by Respondent concerning conduct prior to the date of the preliminary injunction is clearly not prospective and is therefore barred by the Eleventh Amendment.

D.

Notice Relief In Any Form Constitutes Compensation For Past State Inaction In This Case.

The *en banc* opinion narrowly construes the significance of the Eleventh Amendment and *Edelman* to relief which in substance creates or imposes a liability upon a nonconsenting state. In the Court's opinion, a mere explanatory notice would not create or impose any monetary liability and any liability which ultimately results will be due to a state determination, not a federal one. This reasoning is faulty for two reasons: one, it does not accurately describe the chain of causation between the exercise of federal court power and the ultimate payment of state monies for retroactive benefits; second, it fails to acknowledge the essentially compensatory nature of notice relief under the circumstances of this case.

The *Edelman* Court expressly disapproved of equitable restitution because "It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination but as a form of compensation", 415 U.S. at 668. Compensatory relief is relief which makes reparations for the past, whether directly or indirectly. The Eleventh Amendment bars compensatory relief which is directed at the state and which is not intended to remedy, in the future, official wrongdoing. *Cf., Miliken* v. *Bradley,* —— U.S. ——, 97 S. Ct. 2749 (1977).

Notice relief in any form under the circumstances of this case is essentially compensatory because past state denial of AABD assistance is wholly unconnected to present Illinois compliance with federal time standards for application processing. There is no link between notice relief in 1978 and an individual's 1968 need for financial assistance.

Indeed, notice relief may very well compensate by retroactive payments persons no longer on the welfare rolls. Moreover, even if a person to whom notice were directed is presently on welfare, it is implausible that the withholding of assistance in 1968 coincides with a present need for assistance.

As this Court noted (citing with approval Judge McGowan's analysis in *Rothstein* v. *Wyman,* 467 F. 2d 226, 235 (2nd Cir. 1972)), 415 U.S. at 667, n. 11, "the fundamental goal of congressional welfare legislation" is "the satisfaction of the ascertained needs of impoverished persons". However

> As time goes by . . . retroactive payments become compensatory rather than remedial; the coincidence between previously ascertained needs and existing needs becomes less clear. *Ibid.*

Compensatory relief which results in retroactive payments also has the effect of depriving the state of scarce funds, appropriated and needed for the state's current budgetary requirements, as reparations for the past.

Given the change in law pursuant to which the AABD program was replaced by the SSI program, see p. 25, *supra,* and the relatively distant time period in which benefits were withheld, Petitioner submits that any form of notice relief with respect to retroactive benefits is barred by the Eleventh Amendment as compensatory relief. Such relief is neither "a necessary consequence of" nor an "adjunct to the purely prospective relief granted" in 1972.

E.

There Is No Post-*Edelman* Authority In Support Of The En Banc Order Permitting Notice Relief.

Respondent below relied basically on five cases for the proposition that the Eleventh Amendment and *Edelman* do not preclude a federal court from fashioning notice relief concerning retroactive benefits. Two of those cases were pre-*Edelman* and do not support Respondent's post-*Edelman* motion. *Grubb* v. *Sterrett, supra; Doe* v. *Gillman, supra.*[10] A third, *Morris* v. *Houston, supra,* has already been adequately distinguished as involving prospective relief. Judge Whelan, in the Court of Appeals panel decision,

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10. *Grubb* v. *Sterrett,* 315 F. Supp. 990 (N.D. Ind. 1970), *sum. affd.* 400 U.S. 922, and *Doe* v. *Gillman,* 479 F. 2d 646 (8th Cir. 1973) *cert. denied,* 421 U.S. 920 (1975), were similar cases. Both district court decrees ordering notice were based upon the failure of state officials to act pursuant to federal statutes with respect to eligibility and entitlement to benefits under federal assistance programs. In *Grubb,* the court ordered Indiana officials to advise the plaintiffs of their eligibility for benefits and of their right to seek retroactive payments under state law. In *Doe* the district court ordered the state officials to notify plaintiffs that prior action by the state had been erroneous with regard to eligibility. Neither court was not confronted with an Eleventh Amendment defense. Both cases were decided prior to this Court's decision in *Edelman* which was "the first opportunity the Court has taken to fully explore and treat the Eleventh Amendment" issue. 415 U.S. at 670-671. While the summary affirmance in *Grubb* may be binding upon lower courts, *Hicks* v. *Miranda,* 422 U.S. 332 (1975), it has little value as precedence in the Supreme Court. *Edelman,* 415 U.S. at 671.

clearly demonstrated the non-applicability of the remaining two, *Fitzpatrick* v. *Bitzer* 427 U.S. 445 (1976); *Lewis* v. *Shulimson,* 534 F. 2d 794 (8th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977). Petitioner stands on Judge Whelan's remarks. 551 F. 2d at 155.

The *Grubb* case however deserves additional comment if only because Respondent insists that its ruling on notice still is good law. Respondent claims that because *Edelman* expressly overruled three other summary affirmances of judgments which had ordered the actual payment of retroactive benefits, and did not so specifically state as to *Grubb,* that the summary affirmance still stands. 415 U.S. at 670, n. 13. Such a result would be absurd, for the Supreme Court in *Edelman,* in footnote 13, in referring to the three cases by name, stated that "[D]ecisions of this Court in which we summarily affirmed a decision of a lower federal court which ordered the payment of retroactive awards and in which the jurisdictional statements filed in this Court raised the Eleventh Amendment defense *include:*" (Emphasis supplied.)

Clearly, the majority opinion did not mean that if there were other such cases they could still stand as binding authority, despite the decision in the case.

Thus, Mr. Justice Douglas in dissent, 415 U.S. at 683, cites other cases which had been affirmed by the Supreme Court in spite of the argument that the order was an incursion on the Eleventh Amendment. Certainly it cannot be contended that just because Mr. Justice Rehnquest for the majority did not specifically refer to them by name, they are still good law. One of these was *Gaither* v. *Sterrett,* 346 F. Supp. 1095 (N.D. Ind. 1972), *aff'd.* 409 U.S. 1070, which grew out of Indiana's statutory response to the *Grubb* v. *Sterrett* decision.

While there is no post-Edelman authority supporting the *en banc* decision being reviewed here, Petitioner's Eleventh Amendment defense is squarely buttressed by the decision in *Fanty* v. *Commonwealth of Pennsylvania, Dept. of Public Welfare,* 551 F. 2d 2 (3rd Cir. 1977), *pet. for cert. filed* June 3, 1977, No. 76-6853. The Seventh Circuit in its opinion openly concedes that "there are some factual distinctions between [*Fanty*] and the present case, but they are not so significant as to avoid conflict in principle" with the conclusion reached. 563 F. 2d at 873

In *Fanty* recipients of lump-sum social security benefits filed suit against officials of Pennsylvania to enjoin the defendants from attempting to collect their federal benefits in reimbursement of amounts granted under state welfare laws. While the state has terminated its collection practices, the District Court, acknowledging that *Edelman* stood as a bar to restitution of benefits illegally collected, nonetheless ordered notice relief on the theory that notice constituted "limited prospective relief".

Notice relief was ordered for two sub-classes of recipients, 551 F. 2d at 3:

> (1) welfare recipients who are currently reimbursing DPW, on an installment basis for claims established prior to November 1, 1973 [the date the state terminated its collection practice]; and
>
> (2) all welfare recipients who may have pendant state law claims again DPW, i.e., persons who have made either lump sum or installment reimbursement payments to DPW since November 1, 1973, either because DPW coerced or misled them into making such payments or because the payment though voluntary was obtained in violation of DPW regulations which prohibit case workers from becoming involved in the collection process.

The notice would inform members of each subclass that (a) they were under no legal obligation to make reimbursement and (b) they may have a state claim for a refund.

Chief Judge Seitz's opinion in *Fanty* constitutes the opinion of the Court of Appeals, is therefore the controlling opinion in the case[11], and is the one upon which Petitioner relies. Judge Seitz found the District Court's order

> [m]ust be regarded as a grant of relief, and not as a measure adopted to supervise the conduct of the litigation, since the district court was attempting to make welfare recipients aware of their possible right to file state petitions for refunds. Second, while the district court was concerned about payments which federal beneficiaries might make in the future, this concern was motivated by its view of DPW's past, not current practices.
>
> * * * * *
>
> [w]hile plaintiffs requested relief for "all present and past" federal welfare recipients "who have been . . . or are subject" to DPW collection efforts, the court only granted notice to those who have been affected by past practices.
>
> In sum, the court's order looks to a "past breach of a legal duty," and is not a "necessary consequence of compliance in the future with a substantive federal-question determination." 551 F. 2d 4-5

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11. Judge Garth concurred in the reversal of the District Court's order on the ground that there was no case or controversy. Judge Hunter dissented but in doing so conceded "[T]here may be Eleventh Amendment problems" with the relief granted the second subclass. 551 F. 2d at 11, n. 2

This reasoning led Judge Seitz to conclude, correctly, that the notice relief ordered for both subclasses was not "limited prospective relief" against a state official, but prohibited retrospective relief against the State of Pennsylvania.

Petitioner submits that *Fanty* is persuasive authority that the notice relief granted in the instant case is similarly barred by the Eleventh Amendment and this Court's decision in *Edelman.*

CONCLUSION

In *Ford Motor Company* v. *Department of Treasury,* 323 U.S. 459, 464 (1945) this Court stated:

> When the action is *in essence* one for the recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit . . ." (Emphasis added).

Petitioner submits that the Motion for Notice Relief and the *en banc* judgment of the Court of Appeals for the Seventh Circuit are directed against a nonconsenting sovereign state in violation of the law of this case as established by this Court in *Edelman* and the Eleventh Amendment to the United States Constitution.

Petitioner requests that the *en banc* judgment and opinion below be reversed and remanded with specific instructions to insure that both the letter and the spirit of the Court's mandate are faithfully executed.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North LaSalle Street, Suite 900,
Chicago, Illinois 60601 (312) 793-3500,
Attorney for Petitioner.

WILLIAM A. WENZEL,
Special Assistant Attorney General,
130 North Franklin Street, Suite 300,
Chicago, Illinois 60606 (312) 793-2380,
Of Counsel.

SUPPLEMENT

SUPPLEMENT

CONSTITUTIONAL PROVISIONS INVOLVED

Eleventh Amendment to the United States Constitution.

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State."

FEDERAL REGULATIONS INVOLVED

45 C.F.R. § 206.10 Application, determination of eligibility and furnishing of assistance.

(a) *State plan requirements.* A State plan under title I, IV-A, X, XIV, XVI, or XIX of the Social Security Act shall provide that:

* * * * *

(3) A decision shall be made promptly on applications, pursuant to reasonable State-established time standards not in excess of:

(i) 45 days for OAA, AFDC, AB, AABD (for aged and blind), and MA (for aged, blind, and families with children); and

(ii) 60 days for APTD, AABD (for disabled) and MA (for disabled). Under this requirement, the applicant is informed of the agency's time standard in acting on applications, which covers the time from date of application under the State plan to the date that the assistance check, or notification of denial of assistance or change of award, or the eligibility decision with respect to medical assist-

ance, is mailed to the applicant or recipient. The State's time standards apply except in unusual circumstances (e.g., where the agency cannot reach a decision because of failure or delay on the part of the applicant or an examining physician, or because of some administrative or other emergency that could not be controlled by the agency), in which instances the case record shows the cause for the delay. The agency's standards of promptness for acting on applications or redetermining eligibility shall not be used as a waiting period before granting aid, or as a basis for denial of an application or for terminating assistance.

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